No. ......[illegible]......

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation,

Bankrupts,

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Appellant,

vs.

KETCHAM & ROTHSCHILD, INC., a Corporation, and ROBERT W. IRWIN COMPANY, a Corporation,

Appellees,

and

KETCHAM & ROTHSCHILD, INC., a Corporation,

Cross-Appellant,

vs.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Cross-Appellee,

and

ROBERT W. IRWIN COMPANY, a Corporation,

Cross-Appellant,

vs.

WALTER S. OSBORN, as Trustee in Bankruptcy for RENFRO-WADENSTEIN, a Corporation, and RENFRO-WADENSTEIN FURNITURE COMPANY, a Corporation, Bankrupts,

Cross-Appellee.

UPON APPEAL AND CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORHERN DIVISION.

BRIEF OF KETCHAM & ROTHSCHILD, INC. AND ROBERT W. IRWIN COMPANY, APPELLEES AND CROSS-APPELLANTS.

POE, FALKNOR, FALKNOR & EMORY,
Solicitors for Appellees and Cross Appellants.

ACTIVE PRESS SEATTLE

Filed
SEP 12 1931

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STATEMENT.

This matter is before the court upon appeal and cross-appeals from a judgment in the United States District Court for the Western District of Washington, Northern Division, entered upon petitions in reclamation of appellees and cross-appellants. The petitions in reclamation sought recovery from the Trustee in Bankruptcy of Renfro-Wadenstein, a corporation, whose trustee is appellant and cross-appellee herein, of large shipments of furniture consigned to bankrupt by petitioners, together with unpaid accounts receivable representing furniture so consigned, together with the proceeds of the sale of said consigned furniture traceable to the Trustee. The Referee denied petitioners any relief and was, on petition for review, overruled by the District Court as respects to validity of the consignment agreements upon which the petitions were based, but was in other respects affirmed.

Hereafter in this brief, for the sake of brevity, appellee and cross-appellee, Walter S. Osborn, as Trustee in Bankruptcy for Renfro-Wadenstein, a corporation, will be be referred to as trustee, and appellees and cross-appellants, Ketcham & Rothschild, Inc., a corporation, and Robert W. Irwin Company, a corporation, will be referred to as petitioners.

The printed transcript of record was not received by petitioners until August 31st and the argument being set before this court for September

14th, petitioners' brief is necessarily being prepared and submitted without the opportunity of examining bankrupt's brief. It is believed, however, that the assignment urged by bankrupt and authorities in support thereof can be fairly accurately anticipated in this brief.

The testimony in this case was originally taken before Cicero R. Hawkins, Referee in Bankruptcy, but no decision was arrived at prior to his death and the matter was thereafter presented to Ben L. Moore, as Referee in Bankruptcy, upon the testimony so taken by Referee Hawkins. No court passing upon the issues herein involved has had the opportunity of observing the witnesses testifying and each court has rendered its decision upon the printed record alone. The testimoy introduced at the hearing before the referee was voluminous, comprising in all something in excess of six hundred typewritten pages. The parties to this appeal, conceiving that the summary of the evidence in this matter contained in the Certificate upon Review of Ben L. Moore as Referee in Bankruptcy, contained a fair and comprehensive summary of the testimony adduced, have stipulated that the summary of the evidence be considered upon this appeal to be the statement of evidence herein (Tr. p. 274 *et seq.*), and upon said stipulation an order was entered fixing the summary of evidence of said referee as a statement of evidence on appeal in this matter. (Tr. 280.)

The Petitions in Reclamation of Ketcham & Rothschild, Inc., and Robert W. Irwin Company, together with the exhibits attached to those petitions as filed, are found on page 107 *et seq.* and 138 *et seq.* of the transcript. The petition of Robert W. Irwin Company alleges that on the 1st day of April, 1928, it entered into a consignment agreement, which will be found at page 112 of the transcript, and pursuant thereto shipped to the bankrupt upon consignment quantities of furniture more particularly described in the exhibits attached to said petition.

The petition further alleges that on the 6th day of August, 1928, the bankrupt, for valuable consideration, and for the purpose of carrying out the terms and provisions of paragraph 9 of the consignment agreement, sold to the petitioner certain furniture and merchandise, executing a bill of sale therefor, the bill of sale appearing on page 117 *et seq.* of the transcription. The property covered in the bill of sale was held by the bankrupt "on consignment and under and subject to all of the terms and conditions of the contract" as provided in paragraph 9 of the consignment agreement. The prayer of the petition is for delivery of the consigned furniture in the hands of the trustee, together with any and all accounts receivable representing any of the consigned furniture which had been sold by the bankrupt or by S. T. Hills as the assignee for the benefit of its creditors and for the moneys in the hands of the bankrupt or its trustee representing

the proceeds of the sale of the consigned merchandise.

The petition in reclamation of Ketcham & Rothschild, Inc., alleges the execution of a consignment agreement on March 30th, 1928, between the petitioner and the bankrupt and the subsequent shipment of furniture to the bankrupt pursuant to the terms of said consignment agreement (Tr. p. 138 *et seq.*). It further alleges the execution of a bill of sale by the bankrupt to petitioner on the 16th day of April, 1928, covering merchandise in the hands of the bankrupt prior to the execution of the consignment contract, said bill of sale having been executed pursuant to the terms of paragraph 9 of the consignment agreement, which will be found in the transcript at page 144 *et seq.*, and which is identical in its terms with that of the Irwin consignment agreement. The filing of the bill of sale for record on April 24, 1928, is also pleaded and the same relief is asked for as in the Irwin petition. These petitions were filed on November 17th, 1928.

The trustee interposed general denials to these petitions, which will be found on page 132 *et seq.*, and page 155 *et seq.* of the transcript, and which also pleaded affirmatively the following defenses:

1. That the consignment agreements and bills of sale were fraudulent and void because:

(a) The consignment agreements and bills of sale were not recorded in the office of the

Auditor of King County as required by Remington's Compiled Statutes, Sec. 5827, requiring the recording within ten days of a bill of sale where the property is left in the possession of the vendor.

(b) That the bill of sale was, in fact, a chattel mortgage and was therefore invalid because lacking the affidavit of good faith, and the failure to record the same within ten days as required by Remington's Compiled Statutes Sec. 3780 *et. seq.*

(c) That at the time of the execution of the bill of sale the bankrupt was insolvent, which fact was known to petitioners and the bill of sale created an unlawful preference.

(d) The consignment agreements were a mere pretense, masking a conditional sale.

(e) That the consignment agreements were, in fact, a conditional sale, and not being filed within ten days after the taking of possession by the vendee were invalid.

These affirmative defenses were denied by petitioners in their replies (Tr. p. 136 *et seq.*, and p. 159 *et seq.*).

The District Court in its decision (Tr. p. 222 *et seq.*) and its order entered thereupon (Tr. p. 239 *et seq.*) held that the consignment agreements were entered into in good faith between the parties and

were valid as to all furniture shipped subsequent to April 1st, 1928, the dates of the execution thereof; that the petitioners were not entitled to recover the merchandise described in the bills of sale for the reason that the same had not been filed within ten days of the date of the sale, and further that as to the unpaid accounts receivable, representing consigned merchandise sold, and as to the proceeds thereof, petitioners had not sufficiently traced those properties into the hands of the trustee.

On October 3rd, 1928, the bankrupt made an assignment to S. T. Hills for the benefit of its creditors. The petition in bankruptcy was filed October 19th, 1928. The order of adjudication was entered on November 9th, 1928. J. L. McLean was appointed receiver on November 15th, 1928, and W. S. Osborn was elected and qualified as trustee on November 21st, 1928. (Tr. p 92, Finding 31.)

The following facts may be gleaned from the statement of evidence (Referee's summary) with reference to the

ROBERT W. IRWIN COMPANY CLAIM.

Prior to the execution of the consignment agreements, Renfro-Wadenstein, Inc., had been engaged for a number of years as a retail furniture dealer in Seattle, carrying a very high grade of merchandise. On April 4th, 1928, it moved from Fifth and Virginia Streets to its new store located at Fifth and Pine Streets, the latter move being from the out-

skirts into the very heart of the retail merchandising district in Seattle. For approximately five years prior to the filing of the petition in bankruptcy, the bankrupt had been dealing with the two petitioners, Ketcham & Rothschild, Inc., being located at Chicago, and Robert W. Irwin Company, being located at Grand Rapids, both of these concerns manufacturing upholstered furniture, bedroom furniture and dining room furniture of the very highest grade. (Tr. p. 36.) In November, 1927, the bankrupt owed each petitioner the sum of $20,000.00, which, as respects the Irwin Company, it agreed to liquidate at the rate of $2,000.00 a month, commencing in November. Two payments of $2,000.00 each, one in November and one in December, 1927, were made by the bankrupt on the Irwin indebtedness, thus reducing it to $16,000.00 at the time of the execution of the consignment agreement. (Tr. p. 3.) In March, 1928, the Irwin Company received from the bankrupt an order for $15,000.00 worth of furniture. The Irwin Company refused to accept this order until further payments had been made. (Tr. pp. 3 and 4.)

In March, 1928, prior to the execution of the consignment agreement, Mr. Irwin, president of the Irwin Company, had a conference with Mr. Jack Rothschild, president of Ketcham & Rothschild, Inc., with whom the bankrupt was also dealing and whose situation with reference to the previous extension of credit to the bankrupt was practically the same as

the Irwin Company, the conference being with reference to the bankrupt's account. (Tr. p. 4.) It was agreed at that time that Mr. Rothschild should go to Seattle and interview the bankrupt for the purpose of negotiating some arrangement, subject to Irwin's approval. It was suggested at that time by Mr. Irwin that perhaps a consignment agreement between the bankrupt and the two petitioners might prove satisfactory, and with that in mind Mr. Rothschild was furnished by Mr. Irwin with a form of consignment contract. (Tr. p. 4.)

Mr. Rothschild arrived in Seattle about March 20th, 1928, and remained there for three days, during which time, acting both for his own company and the Irwin Company, subject to the latter's approval, he negotiated with the bankrupt for some satisfactory solution of the existing condition which might permit the bankrupt to carry the goods of the two petitioners in the future. (Tr. p. 20.)

On March 27th or 28th the Irwin Company received two copies of the consignment agreement (Petitioner's Exhibit 27), together with a letter from the bankrupt dated March 23rd (Petitioner's Exhibit 26) (Tr. p. 4). When the two copies of the contract were received by Mr. Irwin they had been signed by the dealer but the date was blank and he inserted the date as April 1st, 1928, and immediately executed it upon behalf of his company. (Tr. 4.) He retained both copies of the contract in his possession until September 5th, when one con-

tract was sent back to the bankrupt. (Tr. pp. 4 and 5.)

Although the trustee has contended to the contrary, the letter of March 23rd, which modifies in certain respects paragraph 9 of the consignment agreement, was found by the referee to have been executed contemporaneously with the consignment agreement (Findings 7 to 9 inclusive, Tr. pp. 86 and 87), and this is shown conclusively by the testimony of all parties present at that time, which will be hereinafter referred to.

At the time of the execution of the consignment, the amount of Irwin Company furniture in the hands of the bankrupt was, at its invoiced price, larger in the aggregate than the indebtedness owing at that time from the bankrupt to the Irwin Company. The bankrupt had on its floors merchandise which had been previously sold it by the Irwin Company upon open account, of its Royal brand amountinp to $14,490.00 (Tr. p. 65) and in addition thereto had some of Irwin Company's Phoenix brand furniture, which had also been sold upon open account. The consignment agreement not only contemplated the shipment of furniture in the future upon consignment, but also contemplated the sale back by the bankrupt to both petitioners of merchandise of petitioners theretofore sold bankrupt and at that time on bankrupt's floors in consideration of the cancellation of the indebtedness created by the sale of

that furniture to bankrupt and the further shipment of furniture upon consignment.

This was stipulated in paragraph 9 of the consignment agreement reciting that the bankrupt had in its possession certain merchandise "as per an attached list" which had theretofore been sold and delivered to the bankrupt by the petitioner on credit and had not been paid for and that the title to said previously sold merchandise "is hereby transferred and conveyed back" to the petitioner and should thereafter be treated as on consignment and subject to all of the terms and conditions of the consignment agreement. (Tr. p. 5.) The same paragraph further provided that the Irwin Company thereby cancelled the indebtedness of the bankrupt for said previously sold goods.

It was to amend this paragraph of the consignment agreement that the letter of March 23rd was drafted (Petitioner's Exhibit 26). As appears from its terms, it modifies the provisions of paragraph 9, which assume a sale *in praesenti* and calls for a transfer back of the merchandise of petitioner upon bankrupt's floor after that merchandise had been ascertained by the furnishing of an inventory to petitioner. That letter reads as follows:

> "Referring to the *attached* memorandum of agreement:
>
> It is our understanding that we are to furnish, shortly after the first of the month, an inventory of all of your merchandise on hand;

That we also are to furnish bill of sale *which will act as a transfer back* to your Company of this merchandise, and that any difference in the amount of the account will be taken care of in three (3) equal payments, thirty, sixty and ninety days.

This refers in particular to paragraph number nine." (Italics supplied.)

This letter was written by the bankrupt at the instance of Mr. Rothschild and was signed contemporaneously with the consignment agreement. (Tr. p. 20.) As is inferred from this letter, no list of the merchandise to be transferred back to the petitioner was attached to the consignment agreement. As a matter of fact, the parties at that time had not come to a meeting of minds as to just what furniture was to be transferred back by the bankrupt to the Irwin Company.

Between April 1st, 1928, the date of the Irwin consignment agreement, and August 6th, 1928, the date of the bill of sale to the Irwin Company, correspondence was taking place between the bankrupt and the Irwin Company in an endeavor to get a bill of sale which would contain a correct list of the merchandise which the Irwin Company would be willing to take back. (Tr. pp. 6 to 10 inclusive.) By reason of the fact that at the time of the execution of the consignment agreement the bankrupt had more Irwin Company furniture on its floor than the amount of its indebtedness to the Irwin Company, the latter did not desire to take back all of its mer-

chandise because that would have put the bankrupt in the position of being the creditor of the Irwin Company.

On April 28th the bankrupt sent the Irwin Company a bill of sale, which included all of the Irwin furniture on the bankrupt's floor. (Tr. p. 6.) On May 4th Irwin wrote the bankrupt stating that a transfer back of all the furniture would not be satisfactory and suggesting that the bankrupt retain title to all of its Phoenix merchandise, executing a bill of sale for so much of its Royal merchandise as would still leave a balance owing to the Irwin Company, which balance was to be taken care of in cash payments by the bankrupt. (Tr. p. 6.) On May 22nd the bankrupt sent the Irwin Company notes for the Phoenix merchandise, which line was not included in the bill of sale, and on June 4th petitioner wrote the bankrupt that the notes were satisfactory but that "the bill of sale of the Royal goods should be reduced to represent the amount of this debit balance, after deducting these two notes," and that "We cannot see our way clear to take back title to more of the Royal merchandise than this account represents." (Tr. p. 7.) It was further there stated, "We are enclosing herewith a list of items amounting to $14,490.45, which we suggest you convey to us by the bill of sale and this will clear the records under the new arrangement." (Tr. p. 7.)

On July 24th the petitioner wrote the bankrupt complaining that the bill of sale had not been sent in

accordance with the agreement. (Tr. pp. 7 and 8.) On August 4th the bankrupt sent the Irwin Company a letter enclosing a report of sales with two notes to cover the goods sold. This was the only time the bankrupt reported a sale of goods under the consignment agreement to the Irwin Company. (Tr. p. 8.) However, on August 11th the Irwin Company wrote the bankrupt acknowledging receipt of its report of August 4th but calling to the bankrupt's attention the fact that the settlement should be by cash and not by notes, and stating that in that particular instance they would be willing to accept a note settlement. (Tr. pp. 8 and 9.) On August 24th the bankrupt sent the petitioner an inventory of the Irwin Company merchandise on the bankrupt's floor as of July 28th. On September 5th the petitioner acknowledged receipt from the bankrupt of the bill of sale of Royal goods and returned to the bankrupt the consignment agreement which had previously been executed on April 1st, 1928. (Tr. p. 9.) Between April 1st, the date of the execution of the Irwin consignment agreement, and August 6th, the date of the execution of the bill of sale, the Irwin Company and the bankrupt had been operating under the consignment agreement, although as respects the items to be contained in the bill of sale, they were not agreed to until August 6th. (Tr. p. 10.)

If the bankrupt had not executed the consignment agreement and the bill of sale, or, in the al-

ternative, paid what was due on the old account, the Irwin Company would not have shipped it any more furniture. (Tr. p. 11.) Exhibits 55 and 56 attached to the deposition of Robert W. Irwin are duplicates of the invoices of goods shipped by petitioner to bankrupt subsequent to April 1st, 1928, the date of the execution of the consignment agreements and the amount of the shipments subsequent to September 27th by the petitioner to the bankrupt are set forth at page 11 of the transcript.

Mr. Irwin relied upon the bankrupt's financial condition as disclosed by the financial report dated January 1st, 1928, being Exhibit 18a attached to Mr. Irwin's deposition (Tr. p. 11) and, to use his words, "I relied on those representations as to the financial condition of that company. If I had had knowledge that they were in a bad way financially I would not have entertained the execution of the agreement which was made on April 1, 1928." (Tr. pp. 11 and 12.)

Mr. Irwin further testified:

> "I was not concerned about the financial condition of the dealer until I had notice of their putting Mr. Hill in as assignee. At the time we entered into the proposed agreement of April 1, 1928, I knew that they did not have a sufficient amount of money to operate upon the scale upon which they were operating and pay their bills promptly but I had no thought that they were in danger of failure." (Tr. pp. 12 and 13.)

The consideration for the consignment agreement of April 1st, 1928, was that the Irwin Company would continue to ship more goods. They were unwilling to ship more goods on open account but there was no intent on the part of the Irwin Company by the acceptance of the bill of sale or by the execution of the consignment agreement to prefer itself over other creditors of the bankrupt. (Tr. p. 13.)

While the consignment contract provided that the accounts receivable, representing consigned merchandise sold, were to remain the property of petitioner until remittance therefor should have been made to the petitioner or consignor, (see par. 10 of the consignment agreement, Exhibit 27), the dealer had made a practice of discounting its accounts receivable with three finance houses in the City of Seattle. With reference to this practice of discounting Mr. Irwin testified:

> "My company did not at any time authorize the dealer to assign or pledge any accounts representing any goods covered under the agreement of April 1st which were shipped after the agreement was executed, neither did we authorize the dealer to sell any of the accounts receivable representing the goods sold by the dealer which had been obtained from us under the April 1st agreement. We had no knowledge that the dealer was pledging these accounts receivable representing furniture sold by them which had been shipped to them by us subsequent to the execution of the agreement. Prior to April 1, 1928, I had knowledge that the dealer

had a practice of pledging its account receivable. I obtained that information from M. Wadenstein when he was in Grand Rapids in November, 1927. Analyzing his statement, I noticed something in the statement that made me ask him the question and I developed the information from him that they were pledging their accounts receivable. * * * To provide against that practice a paragraph was inserted in the agreement of April 1st because of the knowledge I had of the practice he had been pursuing." (Tr. pp. 15 and 16.)

Paragraph 2 of the consignment agreements provides in part that the consignee "shall hold said goods exclusively for the purpose of resale for the account of said party of the first part at prices not less than the net invoice price;" and paragraph 3 states "party of the second part shall be entitled to retain by way of commission on sales made the surplus obtained and collected by it on the sale of specific items over and above the invoice price thereof."

Mr. Irwin testified that he did not at any time instruct the bankrupt as to the price at which the merchandise was to be sold other than it was not to be sold at less than the invoice price. (Tr. p. 16.) He further testified that no provision was made for keeping the consigned furniture separate and apart from the remainder of the goods on the bankrupt's floor; "it would have to be intermingled with other merchandise sent to them from other concerns in order to make the best display for sale." (Tr. p. 17.)

That the consignment agreement was a *bona fide* arrangement is evidenced by the method in which the books of the parties were kept after its execution. The Irwin Company had on their books a "special discount" for designating the goods which were shipped under the consignment agreement. (Tr. p. 16.) At the time of the receipt of the bill of sale by the Irwin Company, the indebtedness created by the previous sale of merchandise contained in the bill of sale was also cancelled on the books of the Irwin Company, the merchandise described in the bill of sale being at that time transferred from the Renfro-Wadenstein account to the new special account. (Tr. p. 16.)

The bankrupt's method of handling consigned furniture shows the same scrupulous care. Mr. Wadenstein testified:

> "After the execution of the consignment agreement subsequent shipments of merchandise by these two concerns were never carried on our books, they were treated as special invoices and placed in a folder which was marked "consignment.' After the merchandise was sold it was billed to us and then put on the books as a direct obligation of our corporation. Our books indicate a charging off of the old indebtedness to the two petitioners after the consignment agreement. The approximate date of that charging off on our books was late in April, 1928." (Tr. p. 48.)

And he further testified:

> "At the time of the consignment agreement the goods which had been previously shipped by

> the two petitioners were carried on our books as having been sold to my concern on open account. After, or at the time of the execution of the consignment agreement those goods were charged back to these respective factories and then carried in our consignment folder." (Tr. p. 49.)

He further testified:

> "The shipments made by the Irwin Company after April 1, 1928, were made pursuant to the consignment arrangement and the same was the case with Ketcham & Rothschild." (Tr. p. 48.)

The statement which we have just given with reference to the facts concerned in the Irwin claim might well be supplemented by the examination of the numerous letters passing between the bankrupt and the Irwin Company from the date of the execution of the consignment agreement to the assignment for the benefit of creditors of the bankrupt in October, 1928. These letters are all attached as exhibits to the deposition of Robert W. Irwin and the necessity of keeping this brief within reasonable confines prevents more than a reference to them here. It will suffice to say that these letters contain a full and frank discussion by the parties to the consignment agreement with reference to their mutual rights at a time when there was no hint in the mind of petitioner that occasion would ever arise that the validity of the consignment agreement might be questioned. This correspondence bespeaks a guilelessness entirely foreign to the trustee's contention that this contract was but a cloak for a sale and dis-

closes that the parties all along were acting under the belief that their arrangement was one of consignment and not sale. The letters are as follows:*

Bankrupt's letter of March 6th containing financial statement. (Irwin's Exhibit 18.)

Irwin's letter of March 30th reminding bankrupt of its duty to prepare a bill of sale in accordance with the contract. (Irwin's Exhibit 29.)

Bankrupt's letter dated April 5th wherein the latter promises to prepare an inventory and bill of sale "within the next few days." (Irwin's Exhibit 32.)

Bankrupt's letter of April 28th enclosing inventory or bill of sale of goods. (Irwin's Exhibit 36.)

Irwin's letter of May 4th complaining that the bill of sale previously sent covered all of its merchandise on bankrupt's floor and was not in accordance with the agreement. (Irwin's Exhibit 38.)

Wire from Bankrupt dated May 27th explaining execution of bill of sale delayed pending correspondence with Mr. Rothschild as to agreement between bankrupt and Rothschild. (Irwin's Exhibit 39.)

Bankrupt's letter of May 22nd explaining and enclosing correspondence with Mr. Rothschild with reference to agreement as respected Irwin furniture. (Irwin's Exhibit 40.)

Irwin's letter dated June 4th sending to bankrupt items to be included in bill of sale. (Irwin's Exhibit 43.)

---

* The exhibits referred to on this and pages immediately succeeding will be found attached to deposition of Robert W. Irwin.

Irwin's letter of July 24th complaining of bankrupt's failure to send bill of sale as required by agreement and to report sales and settlements. (Irwin's Exhibit 46.)

Bankrupt's letter of July 28th excusing failure to prepare bill of sale and submitting reports. (Irwin's Exhibit 47.)

Bankrupt's letter of August 4th enclosing report of sale and notes. (Irwin's Exhibit 48.)

Irwin's letter of August 11th complaining that bankrupt settled for consigned goods sold by it in notes instead of cash as required by the consignment agreement. (Irwin's Exhibit 49.)

Bankrupt's letter of August 24th enclosing bill of sale. (Irwin's Exhibit 50.)

Irwin's letter of September 7th sent but a few weeks before bankrupt's failure wherein Irwin calls upon bankrupt to comply with the insurance clause of the contract. (Irwin's Exhibit 52.)

The referee found (and the figures hereinafter referred to are supported by the stipulation as to amount of consigned furniture—Tr. pp. 70 and 71—and the testimony of Herbert E. Smith—Tr. pp. 65 to 67), that the amount of furniture of the Irwin Company in the hands of the trustee in bankruptcy was $18,739.50, which included:

(a) Furniture shipped subsequent to the consignment agreement, $10,348.50;

(b) Furniture included in bill of sale, $8,391.00.

The referee further found that the trustee in bankruptcy received contracts and accounts re-

ceivable representing Irwin consignment goods (including both goods described in the bill of sale and goods shipped subsequent to the consignment agreement) amounting to $1,725.00. These receivables were not collected prior to bankruptcy.

The referee further found (Finding 33, Tr. p. 94) that Mr. Hills as assignee:

(a) Received payments on Irwin furniture, including that described in bill of sale and shipped subsequent to consignment agreement, sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $425.67; and

(b) Himself sold Irwin consignment furniture, including that covered by a bill of sale and that shipped subsequent to the consignment agreement, for which there was collected by the assignor, receiver and trustee the sum of $2,062.

The exhibits introduced herein disclose what proportions of the accounts receivable and proceeds of the sale of merchandise above referred to are attributable to merchandise described in the bill of sale and what proportion to merchandise shipped subsequent to the consignment agreement.

We now advert to the facts involved in

KETCHAM & ROTHSCHILD, INC., CLAIM.

At the time of the execution of the consignment agreement the bankrupt owed Ketcham & Rothschild $17,000.00 for merchandise previously sold on

open account. This account was at that time covered by notes. (Tr. pp. 18 and 19.) This credit had prior to the consignment agreement been extended under what Mr. Rothschild called a "frozen credit arrangement," which was, briefly, as stated in petitioner's letter of March 22nd, 1927:

> "We suggest as a credit arrangement that we grant you a standing credit of whatever sum you may have invested in samples of our goods, up to $15,000, you to pay interest at the rate of 7% for the use of this credit; the amount of interest due to be determined and payable at each inventory time. We would want to have the right of closing this special credit at any time by giving you notice in writing, in which case the credit granted for sample purposes would become due for payment net, one year from the time of such notice, interest ceasing from the time of our giving notice. In addition to the credit above suggested we would make the terms for your further purchases subject to terms 2%—30 days, net 60 days, with a 30 day dating." (Tr. p. 28.)

There had been some doubt in Mr. Rothschild's mind prior to October 19th, 1927, whether the bankrupt was purchasing on this frozen credit arrangement but at that time he was definitely advised that the bankrupt was expecting to take advantage of this arrangement. The frozen credit arrangement was terminated on Mr. Rothschild's arrival in Seattle in March, 1928, and before the execution of the consignment agreement. (Tr. p. 29.)

The consignment agreement and the letters of March 23rd (both of which were identical in lan-

guage with the agreement and letter of the same date involved in the Irwin claim) were both signed by Mr. Wadenstein as president of the Renfro-Wadenstein Company on March 23rd contemporaneously. (Tr. p. 20.) Duplicate contracts were taken back to Chicago by Mr. Rothschild and were there signed by his firm on March 30th. (Tr. p. 20.) At the time of the execution of the consignment agreement, Mr. Rothschild did not know how much of his concern's furniture was on the bankrupt's floor. No list of his firm's items of furniture was given him while he was in Seattle, only approximate figures. (Tr. pp. 20 and 21.) The bill of sale (Ketcham & Rothschild, Exhibit 2) was executed April 16th and forwarded by the bankrupt to petitioner and filed for record in the office of the Auditor of King County, Washington, on April 24th, 1928. (Tr. p. 21.) The bill of sale included merchandise which had previously been shipped by Ketcham & Rothschild to the bankrupt prior to the date of the execution of the consignment agreement in the amount of $11,585.25.

Here, as in the case of the Irwin transaction, the books of account of the petitioner and the entries made therein shortly after the execution of the consignment agreement are inconsistent with any conclusion other than that the consignment agreement and bill of sale given pursuant thereto were *bona fide* and above board.

Petitioner's Exhibit 3 contains copies of the invoices covering goods shipped by the petitioner to the bankrupt subsequent to the consignment agreement. They are all marked "terms special," which meant, according to Mr. Rothschild, "We adopted this designation on our invoices 'Terms special' to indicate a consignment arrangement in accordance with the consignment contract." (Tr. p. 30.)

Petitioner's Exhibit 6 is a photostatic copy of one of Ketcham & Rothschild's books of account disclosing an entry as of April 27th, 1928, showing that the bills receivable account was credited with the sum of $11,695.00, being the amount of furniture contained in the bill of sale. The notation reads:

> "Merchandise returned
> To bills receivable
> To received merchandise covered by bill of sale for Renfro-Wadenstein per their statement of April 27th, 1928, excluding items covered by our consignment of April 2nd and April 7th, 1928, still unsold."

Petitioner Ketcham & Rothschild's Exhibit 7 is a photostatic copy from the petitioner's bills receivable ledger disclosing that on April 30th, 1928, the bills receivable account was credited with the $11,695.00 of merchandise contained in the bill of sale.

Petitioner Ketcham & Rothschild's Exhibit 8 is another photostatic copy from the bills receivable records of the petitioner showing that on April 27th,

1928, the notes which had been previously given by the bankrupt for the goods included in the bill of sale were marked "Settled for."

Petitioner Ketcham & Rothschild's Exhibit 9 is a photostatic copy from the consignment sales record of the petitioner showing that on April 27th, 1928, the $11,695.00 worth of merchandise contained in the bill of sale was credited to the petitioner's consignment sales account, and that other shipments made thereafter by the petitioner to the bankrupt were noted on that account.

Petitioner Ketcham & Rothschild's Exhibit 10 is a photostatic copy from the records of the petitioner bearing out the *bona fides* of this transaction.

Petitioner Ketcham & Rothschild's Exhibit 11 shows that on July 31st, 1928, and June 30th, 1928, direct charges were made by the petitioner to the bankrupt of items covered by the consignment agreement which the bankrupt had previously reported sold.

Petitioner Ketcham & Rothschild's Exhibit 12 is another photostatic copy from the records of the petitioner showing that a Renfro-Wadenstein special account was carried by the petitioner, in which all of the consignment shipments, as well as the merchandise covered in the bill of sale, were reflected.

These book entries cannot be denominated self-serving. They were made at a time when no one

anticipated that the validity of either the contract or the bill of sale would be questioned.

Mr. Rothschild was of the opinion that the bankrupt was solvent at the time of entering into the consignment agreement.

> "From the local inquiries which I made I considered that with the assistance of factories like Mr. Irwin's and our own, and the equity they had in the business they had a good chance of becoming a very good firm." (Tr. p. 23.)

At no time was petitioner cognizant of bankrupt's practice of assigning and pledging accounts receivable representing consigned furniture contrary to paragraph 10 of the consignment agreement providing:

> "The consigned goods or the accounts representing the same and the proceeds thereof shall continue to belong to and be the property of the party of the first part until remittance therefor shall have been made to and received by said party of the first part as herein provided."

He testified:

> "While I was aware of the fact that Renfro-Wadenstein were in the habit of borrowing on their bills receivable I could not see what bearing that had on any merchandise we had out there that belonged to us, that they could not borrow on any more than I could on this Smith Building. My letter means that they were borrowing on their accounts receivable but ours was not one of their accounts receivable." (Tr. pp. 31 and 32.)

The testimony further discloses that the bankrupt paid for all consigned merchandise of petitioner reported sold by paying cash therefor, save for one payment which was made by note (Tr. p. 34), and that the petitioner never at any time sought to hold the bankrupt for the invoice price of the goods which were left on consignment but which had not been sold by bankrupt. (Tr. p. 34.)

Mr. Wadnestein expressly testified that as respects both petitioners and the date of execution of the consignment agreement, they were working under the consignment agreement both as regards furniture shipped subsequent to the consignment agreement and the merchandise included in the bill of sale. (Tr. pp. 48, 49 and 57.)

He further testified that the discount companies with whom the accounts receivable in question had been pledged, to-wit, Seattle Discount Corporation, Sunnyside Finance Company and General Discount Corporation, were advised by him after the execution of the consignment agreement as to the fact of its execution. (Tr. p. 58.) The collections on the accounts assigned to the finance houses were made by the bankrupt. The finance houses did not bill the bankrupt's customers on the assigned accounts, nor did they notify the customers of the assignment. The bankrupt's collections on the assigned accounts were placed in its general funds and remittances were made to the finance houses on an average of twice a month. (Tr. p. 58.)

As was the case with the petitioner Irwin Company, the correspondence between Ketcham & Rothschild, Inc., and the bankrupt shows that the former was at all times insisting that the bankrupt live up to the consignment agreement. We here summarize this correspondence:

> Petitioner's letter of March 30th returning the consignment agreement to bankrupt; bankrupt is requested to prepare bill of sale in accodrance with agreement. (K&R's Exhibit 13.)
>
> Petitioner's letter of April 18th complaining of not having received remittance in accordance with contract. (K&R's Exhibit 15.)
>
> Petitioner's letter of May 29th requesting bankrupt to see that future statements and remittances are sent in accordance with agreement. (K&R's Exhibit 19.)
>
> Petitioner's letter of June 26th complaining of not receiving remittance due June 20th. (K&R's Exhibit 23.)
>
> Petitioner's letter of June 29th requesting cash settlements and not notes in accordance with agreement. (K&R's Exhibit 25.)
>
> Petitioner's letter of August 2nd stating remittances have not been made to cover direct charges in accordance with agreement. (K&R's Exhibit 31.)
>
> Petitioner's letter of August 28th complaining contract not complied with by making a remittance for goods sold and requesting that contract be lived up to with respect to assigning of petitioner's accounts. (K&R's Exhibit 36.)

The referee found (and this is supported by the testimony of Herbert E. Smith (Tr. p. 67 *et seq.*)

that there came into the hands of the trustee in bankruptcy $9,984.31 of Ketcham & Rothschild's consigned furniture, which included:

> (a) Furniture described in bill of sale to Ketcham & Rothschild, $5,751.75;
>
> (b) Furniture shipped by Ketcham & Rothschild subsequent to the consignment agreement, $4,232.56. (Tr. p. 95, Finding 34.)

The referee further found that there came into the hands of the trustee in bankruptcy contracts and accounts receivable representing Ketcham & Rothsschild consignment furniture, including both goods described in the bill of sale and goods shipped subsequent to the consignment agreement, amounting to $2,021.00, and that these contracts and accounts had not been collected prior to the bankruptcy proceeding (Tr. pp. 95 and 96).

The referee further found that S. T. Hills as assignee for the benefit of the creditors of the bankrupt received payments on consigned furniture (including that described in the bill of sale and shipped subsequent to consignment agreement) sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $568.75, and further sold Ketcham & Rothschild furniture included in the bill of sale, for which there was collected by the assignee, receiver and trustee the sum of $1,593.50. (Tr. p. 96.)

The referee further found that Mr. Hill as assignee turned over to Mr. McLean as receiver

$2,935.88 (Tr. p. 96, Finding 36), and the report of Mr. McLean as receiver shows that he turned over to the trustee in bankruptcy $5,321.22 in cash. (Tr. p. 75.)

ASSIGNMENTS OF ERROR OF CROSS-APPELLANT ROBERT W. IRWIN COMPANY.

I.

The District Court erred in failing to grant in its entirety the petition in reclamation of Robert W. Irwin Company.

II.

The District Court erred in holding that the bill of sale from Renfro-Wadnestein to Robert W. Irwin Company, dated August 6th, 1928, did not effectively pass title to the merchandise therein described to petitioner.

III.

The District Court erred in ruling that the bill of sale from Renfro-Wadnestein to Robert W. Irwin Company, dated August 6th, 1928, was invalid.

IV.

The District Court erred in failing to find there was a sufficient transfer of the merchandise described in the bill of sale of August 6th, 1928, from the possession of Renfro-Wadenstein as owner to Renfro-Wadnestein as bailee to render inapplicable

the statute requiring bills of sale to be recorded within ten days where the property is left with the vendor.

V.

The District Court erred in failing to find that Renfro-Wadenstein was not insolvent at the time of the execution of the consignment contract and of the bill of sale.

VI.

The District Court erred in failing to find that the bill of sale was executed for a valid, present consideration and was not a preference.

VII.

The District Court erred in failing to find that Robert W. Irwin Company was entitled to the immediate possession of all accounts receivable in the hands of the trustee unpaid by customers of the bankrupt, said accounts receivable representing furniture sold both by bankrupt and by its assignee, said furniture being covered both by said bill of sale and by said consignment agreement.

VIII.

The District Court erred in failing to find and order that Robert W. Irwin Company was entitled to the immediate possession of moneys collected by Renfro-Wadenstein and by S. T. Hills as assignee, said moneys being collections on accounts representing furniture sold, said furniture being cov-

ered both by said bill of sale and said consignment agreement.

IX.

The District Court erred in failing to find that the contracts and accounts receivable of Renfro-Wadenstein, owned by Robert W. Irwin Company, were negotiated to the discount companies by Renfro-Wadnestein without the knowledge or approval of Robert W. Irwin Company.

X.

The District Court erred in refusing to allow Robert W. Irwin Company its costs and attorneys' fees as prayed for.

ASSIGNMENTS OF ERROR OF CROSS-APPELLANT, KETCHAM & ROTHSCHILD, INC.

I.

The District Court erred in failing to grant in its entirety the petition in reclamation of Ketcham & Rothschild, Inc., a corporation.

II.

The District Court erred in holding and finding that the sale of the merchandise included in the bill of sale to Ketcham & Rothschild, executed April 16th, 1928, was completed on March 30th, the date of the execution of the consignment agreement.

III.

The District Court erred in holding that the bill of sale to Ketcham & Rothschild from the bankrupt, executed April 16th, 1928, was not timely recorded under Remington's Compiled Statutes, Sec. 5827.

IV.

The District Court erred in failing to find that Ketcham & Rothschild was entitled to the merchandise described and set forth in the bill of sale executed April 16th, 1928.

V.

The District Court erred in failing to find that said bill of sale was executed for a present and valid consideration and as such did not constitute a preference.

VI.

The District Court erred in failing to find that said bankrupt was not at the time of the execution of said consignment agreement and at the time of said bill of sale insolvent.

VII.

The District Court erred in failing to find that Ketcham & Rothschild was entitled to the immediate possession of the cash and moneys, being the proceeds of the sale of certain furniture sold by the bankrupt and S. T. Hills as assignee, which furni-

ture was covered by the consignment agreement and the bill of sale, which moneys were in the possession of the trustee at the time of the filing of the petition in reclamation.

VIII.

The District Court erred in failing to find that Ketcham & Rothschild was entitled to the immediate possession of all accounts receivable in the hands of the trustee which were unpaid by the customers of Renfro-Wadenstein, such accounts receivable being covered both by the bill of sale and by said consignment agreement.

IX.

The District Court erred in failing to find that the contracts and accounts receivable of Renfro-Wadenstein, owned by the petitioner, were negotiated to the discount corporations without the knowledge or consent of Ketcham & Rothschild.

X.

The District Court erred in refusing to allow Ketcham & Rothschild its costs and attorneys' fees as prayed for.

It will be necessary to consolidate in this brief the argument both on the appeal of the trustee in bankruptcy and upon the cross-appeals of the petitioners in reclamation. The argument upon the trustee's appeal and upon the cross-appeals of the petitioners in reclamation will be presented in such

a manner as to conform to the outline contained in the index to subject matter found at the front of this brief.

ARGUMENT UPON TRUSTEE'S APPEAL.

I. The contracts of consignment are valid ones.

1. The true test of a consignment agreement is the consignor's right to demand recall of consigned goods at any time, which right is given by paragraph 8 of the agreement. The Trial Court in its decision said:

"I have no doubt that the intent of the parties was in good faith to ship future merchandise on consignment, no present liability by the bankrupt was made, or right created to petitioner." (Tr. p. 237.)
The District Court further found (Tr. p. 237):

"The petitioners, as the testimony discloses, had confidence in the bankrupts and 'felt justified in backing them with merchandise to the extent of their new enterprise.'"

Nowhere in the contract do we find any agreement on the part of the bankrupt to purchase. No terms importing sale are implied. Its provisions are only consistent with the finding that the goods shipped under this agreement were to be held by the dealer for the purpose of sale as agent and for the account of the several petitioners. The provisions of the contract requiring insurance in the name of the consignor (par. 2), merchandise to be held for the account of the consignor and sold at not less than invoiced price (par. 2), an itemized

record of sales to be kept and reported to consignor at stated intervals (par. 4), remission of moneys collected to be made at stated intervals (par. 5) and reservation of right by consignor to recall goods (par. 8), are all provisions which indelibly stamp this agreement as one of consignment.

Running throughout all of the cases bearing upon the validity of the consignment agreement will be found expressed the test: Can the consignor under the terms of the contract compel a return of the goods not sold?

In *Sturm vs. Boker,* 150 U. S. 312, 37 L. E. 1093, it was said:

> "The power to request the restoration of the subject of the agreement is an indelible incident of a contract of bailment."

To the same effect are:

In re Eichengreen, 18 Fed. (2nd) 101, (5th C. C. A.).
Mitchell Wagon Co. vs. Poole, 235 Fed. 817 (6th C. C. A. 1916).
In re Galt, 122 Fed. 64 (7th C. C. A. 1903).
In re Harris vs. Bacherig, 214 Fed. 482 (D. C. Tenn. 1913).
Franklin vs. Stoughton Wagon Co., 168 Fed. 857 (8th C. C. A. 1909).

It was said in *Mitchell Wagon Co. vs. Poole, supra:*

> "It may not be amiss, however, to quote from the opinions in them as to the test of determining whether a given contract is a sale or an agency to sell. In the *Galt* case Judge Jenkins said:

'In a bailment the bailor may require the restoration of the thing bailed, and in a sale, whether absolute or conditional, there must be an agreement, express or implied, to pay the purchase price of the thing sold.' "

In the *Flanders* case, he said:

'The rule by which to distinguish between a bailment and a conditional sale we consider as decided in the case of *In re Galt,* 120 Fed. 64 (56 C. C. A. 470). We there held that, if the sender has a right to compel return of the thing sent, it is a bailment, and not a (conditional) sale, and that in a sale there must be an agreement, express or implied, to pay the purchase price.'

In the *John Deere Plow Co.* case, Judge Riner said:

'The plow company had the right, under the contract, to require the goods returned, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money, or its equivalent, for the goods delivered, with no obligation to return.'

In the *Columbus Buggy Co.* case, Judge Sanborn said:

'The power to require the restoration of the subject of the agreement is an indelible incident of a contract of bailment.'

In the *Stoughton Wagon Co. case,* Judge Riner said:

'We think the wagon company retained full control of the disposition to be made of the wagons, in that it could direct the goods returned to the house and shipped elsewhere as desired, and in this it lacks one of the necessary elements of a contract of sale, namely, to pay money or its equivalent for the goods delivered with no obligation to return.' "

The District Court in its decision recognized this rule in stating, "The power to repossess the specific merchandise is an incident to bailment. *In re Columbus Buggy Co.*, 143 Fed. 859. *This right is in the contract,"* (Tr. p. 236.)

The referee in his decision, while recognizing that the consignor's right of recall is the controlling test (Tr. p. 204), held that that right was not given the consignor under the instant contract. (Tr. p. 205.) The logic employed was:

Paragraph 8 of the agreement states "in case any of said goods shall *at any time* be recalled by said party of the first part, the party of the second part shall crate and place on cars at Seattle."

Paragraph 10 provides "In the event party of the first part shall not elect to sell said goods to party of the second part, then upon termination of the contract it shall be the duty of party of the second part to crate and place on cars at Seattle unless otherwise directed by party of the first part."

The referee's conclusion was that the right of recall given by paragraph 8 with its attendant duty on the part of the consignee of crating and placing merchandise on cars at Seattle, prescribed the duties of the consignee and the rights of the consignor *only* in event the consignor terminated the contract as provided in the first subdivision of paragraph 10. The referee's reasoning anticipates the argument that this construction will make of paragraph

8 a mere nullity in view of the provisions in paragraph 10, but meets this by saying that if paragraph 8 confers a right of recall at any time, then that portion of paragraph 10 directing the consignee to crate and place the goods on cars upon termination of the contract adds no rights to and is repetitious of paragraph 8.

It is obvious, however, that paragraphs 8 and 10 pertain to different matters. Paragraph 8 assumes *"the right of recall at any time."* Paragraph 10 makes no reference to the consignor's right of recall and is not repetitious to that extent. It casts the duty upon the consignee of crating and placing the goods on cars, not in case of recall, but only in the event that "party of the first part shall not elect to sell said goods to party of the second part" upon termination of the contract. The referee's construction leaves the words "at any time" completely out of paragraph 8. The drafter of the contract intended to cast upon the consignee the duty of returning the goods at the termination of the contract whether or not demand for recall was made. The referee stated in his decision:

> "If the last named paragraph (par. 8) stood alone, it could be said with much force that its terms presuppose a right to recall at any time, and where such a right is necessarily presupposed, it is, in legal effect, granted." (Tr. pp. 204 and 205.)

This is without doubt a correct statement of the law.

In *Mitchell Wagon Co. vs. Poole, supra,* the contract did not specifically provide that the consignor would be entitled to recall the goods at any time. However, the court assumed the existence of such a right from the provision in the contract that the bankrupt should be entitled to reimbursement for freight and drayage paid out by him if the consignor should order the wagons reshipped or turned over to other parties. The court there said:

> "This follows from the fact that there is no agreement on the part of the bankrupt to pay the prices fixed for the wagons—it was not contemplated that he should pay for them except upon his becoming a purchaser in one of the contingencies named—and that the appellant had the right to demand a return of the wagons at any time. * * * The existence of such a right is to be gathered from the provision that the bankrupt would be entitled to reimbursement for freight and drayage paid out by him if appellant should order the wagons reshipped or turned over to other parties when he had complied with the terms of the contract, but not if appellant concluded it wanted possession because of any violation thereof, to which the provision the bankrupt was to pay all expenses until the wagons were sold or 'ordered away' looked. *This provision rather presupposes that the bankrupt had such right than confers it. But that which is presupposed by a contract is as much a part of it as that which is expressly provided for therein.* This provision may be thought to be a harsh one. But there is no gainsaying that it is there."

The same thing was held in *In re Smith & Nixon Piano Company,* 149 Fed. 111, where the

court assumed the right to demand recall from the fact that the title had been reserved in the consignor. It was there said:

> "While there was no express reservation by the piano company of dominion over the pianos before they were sold, such dominion nevertheless existed as a natural incident to a title it had not parted with. We start with title in the piano company, and unless an intention that it pass to another can be discovered it remains where it was with all appurtenant rights."

This court, *In re King,* 262 Fed. 318, had before it the same question and said:

> "The fact that there was no express agreement that the title to the property delivered by the Empire Company to King should remain in the former, nor for the return by King of such portion of it as remained unsold by him to the consignor, does not show, nor, indeed, tend to show, that the transaction between the parties was anything more than the ordinary one of the consignment of personality for sale, unattended, as it was, by any positive act of the consignor that can be properly held to have enabled the consignee to commit any fraud upon the public."

See also *Franklin vs. Stoughton Wagon Co.,* 168 Fed. 857 (8th C. C. A. 1909).

2. Paragraph 10 of the Agreement (Option Clause) Does Not Render It One of Sale.

Paragraph 10 of the consignment agreement reads:

> "This contract shall continue in force and effect until terminated by one or both of the

parties hereto by written notice given to the other, but in case of such termination party of the first part shall have the right at its option to require party of the second part to keep and pay for the consigned goods then remaining on hand at the invoiced price thereof. Party of the second part to be entitled to the following terms: 25% thereof every thirty days until fully paid."

The trustee has urged throughout this proceeding that the paragraph of the contract just quoted was sufficient to classify it as one of sale rather than consignment on the theory that its provisions indicated the parties to the agreement contemplated a purchase by the dealer. The testimony of Mr. Irwin (Tr. p. 18) and the testimony of Mr. Rothschild (Tr. p. 35) discloses that at no time did the petitioners seek to exercise the option given them under this paragraph to require the consignee to pay for the goods which were left in its hands on the termination of the contract.

This argument was answered by the District Court's decision in the following language:

> "The agreement of the bankrupt to buy the merchandise at the option of the manufacturer at the termination of the contract does not create a sale, as the parties may make a valid consignment agreement making provision for change, and until the change is effected, the agreement is one of consignment. *Mitchell Wagon Co. vs. Poole,* 235 Fed. 817. * * * The contingency not having matured into a fixed status, the merchandise shipped on consignment and delivered to the trustee, should be accounted for by him." (Tr. pp. 236 and 237.)

This statement of the law is supported by the following decisions:

> *In re Eichengreen,* 18 Fed. (2nd) 101;
> *Mitchell Wagon Co. vs. Poole,* 235 Fed. 817;
> *In re Galt,* 120 Fed. 64;
> *In re Harris & Bacherig,* 214 Fed. 482;
> *Franklin vs. Stoughton Wagon Co.,* 168 Fed. 857;
> *McClallum vs. Bray-Robinson Clothing Co.,* 24 Fed. (2nd) 35;
> *Bransford vs. Regal Shoe Co.,* 237 Fed. 67;
> *In re Thomas,* 231 Fed. 513.

In re Thomas, supra, it was stated:

> "Applying this rule to the case at bar, the question is, Whether the bankrupt assumed liability for the purchase price of the pianos at the time he received same. It is clear from reading the contract that the bankrupt did not assume this liability, but he was only to become liable for the pianos in the event the Piano Company at the end of six months exercised the option to require him to pay for same. This contingency never arose in this case, and therefore the pianos remained on consignment with the bankrupt at the time of his adjudication, and the trustee took them in the same plight."

The referee attempts to distinguish these cases in his memorandum decision (Tr. pp. 207 and 210 inclusive) on the ground that most of the cases there cited involved contracts giving the consignor the right to recall the goods at any time. However, as we have shown under the subheading immediately preceding this, that right also existed in the instant contract.

The referee further distinguishes the instant case by saying that here the option given in paragraph 10 is not dependent on any outside condition or contingency, such as the dealer's breach or failure to perform the contract or the expiration of a fixed period of time, but might have been exercised by the manufacturer at its will at any time by terminating the contract. (Tr. p. 210.) We have been unable to find any cases supporting this distinction. The rationale of the decisions above cited is that the parties did not, by such an optional provision, contemplate a sale until the exercise by the consignor of his option to require the consignee to purchase. Logically it can make no difference whether the option to purchase might be exercised on his own whim or might be exercised by the consignor for some act or default of the consignee. The fact remains in both instances that it never was the intention of the parties to effect a sale *until the option was exercise.*

In *Mitchell Wagon Co. vs. Poole, supra,* an agreement requiring the dealer to purchase at the manufacturer's option, (a) at the expiration of the selling period of twelve months, and (b) in case the dealer sold or closed out his business, was held valid. That contract further provided that the consignee might become a purchaser at any time during the twelve months period by paying cash for the consigned merchandise. The argument advanced by the referee would be just as applicable to

a contract giving the consignee the right to purchase without any affirmative act of the consignor as it is to paragraph 10 of the instant contract.

In re Galt, supra, it was said:

> "The company should not compel a return of the goods not sold. Galt had not the option to pay for them in money. Even with respect to the goods unsold within the 12 months, the option for their return or payment was with the company, and not with Galt; and nowhere in the agreement does the latter covenant to pay for these goods as in the case of a sale."

In *Bransford vs. Regal Shoe Company, supra,* the contract contained a provision identical with that of paragraph 10 of the instant contract, providing:

> "That upon the termination of this agreement it (consignee) will purchase of the party of the first part (consignor) all consigned goods then on hand at invoiced prices and terms."

The contract further provided that the contract might "also be terminated by party of the first part at any time by giving thirty days' notice in writing to that effect to party of the second part." So that in the Bransford case the consignor might, as here, by its act in terminating the agreement exercise the option to require the consignee to purchase, yet it was there held that the consignment contract was a valid one.

3. The District Court's Decision Is Supported by:

A. Decisions of This Court.

The District Court's decision is in harmony with the following decisions of this court:

> *General Electric Co. vs. Brower,* 221 Fed. 597;
> *In re King,* 262 Fed. 318;
> *Berry Bros. vs. Snowden,* 209 Fed. 336,
> *Miller Lumber Co. vs. Citizens Trust and Savings Bank,* 233 Fed. 488.
> See also *In re Caldwell Machinery Co.,* 215 *Fed.* 428 (D. C. Wash.)

In *Berry Bros. vs. Snowden, supra,* this court, in reversing a decision of the District Court of Washington holding that the contract there involved was one of sale rather than consignment, said in part:

> "It will be seen from the foregoing statement that the proper disposition of the appeal depends upon the true character of the agreement between Berry Bros. and Graves & LaBelle. The court below held that it constituted as to the creditors, if not an absolute sale, a conditional one, and that it was void as against the creditors because not recorded pursuant to a statute of the state of Washington requiring recordation of such sales. But we are unable to so regard the contract between the parties. We think it was not a sale of any kind. In more than one place in the agreement it is distinctly stated that the goods were to be consigned for sale, which is an altogether different thing. The true distinction between a sale and an option to purchase, said the Supreme Court in *Sturm vs. Boker,* 150 U. S. 329, 14 Sup. Ct. 99, 37 L. Ed. 1093, is pointed out by the Supreme Court of Massachusetts in *Hunt vs. Wyman,* 100 Mass. 198, 200, as follows:

'An option to purchase if he liked is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return.'

Such cases are strictly analogous to that now before us. If, as the court below in effect held, the title to the goods under the contract passed from Berry Bros. to Graves & LaBelle, how comes it that the former were thereby required to pay the freight, cartage, storage and insurance on the goods while in Graves & LaBelle's warehouse? Such provisions in respect to payments by Berry Bros. are wholly inconsistent with the passing of the title to the property from them to Graves & LaBelle. So, also, is that other provision of the contract by which the latter agreed 'to pay for such goods sold by them or taken from consigned goods while in their possession on the terms which they are billed by the party of the first part on their regular invoice.'

The invoices, or 'detailed statements' as they are called in the stipulation of the parties, did not change the terms of the written agreement under which the property was sent to the consignees. 'An invoice,' as said by the Supreme Court in *Dows vs. National Exchange Bank,* 91 U. S. 618, 630 (23 L. Ed. 214), 'is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and it is as appropriate to a bailment as it is to a sale. * * * Hence, standing alone, it is never regarded as evidence of title.' See also, *Sturm vs. Boker,* 150 U. S. 312, 328, 14 Sup. Ct. 99, 37 L. Ed. 1093.

And that neither of the parties to this contract considered that it was in truth anything more than it purported to be, to-wit, a mere consignment of the goods for sale upon the terms and conditions therein stated, is very clearly shown by the agreed statement of facts, from which it appears, among other things, that Berry Bros. at various times 'withdrew parts of the goods so consigned by them and stored them as aforesaid and sold the same on their own account, independent of, but with the knowledge of and without objection by, the the said Graves & LaBelle'; and that, whenever Graves & LaBelle withdrew any portion of the said consigned goods from their warehouse, report of such withdrawal was made by them to Berry Bros., and 'monthly statements were rendered by said Berry Bros. to said Graves & LaBelle of the amount of such stock so withdrawn during the preceding month.' It is manifest that such conduct of the parties is wholly inconsistent with the idea of a sale on the part of the one and a purchase by the other.

We think the contract clearly one of bailment, and that the bankrupts never acquired title to any of the consigned property that they did not purchase pursuant to the option given them by the contract. See *Sturm vs. Boker,* 150 U. S. 328, 329, 14 Sup. Ct. 99, 37 L. Ed. 1093. While it is true that under the amendment of the Bankruptcy Act of June 25, 1910, a trustee in bankruptcy is vested with the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings, the lien so given is a lien on the property of the bankrupts and not a lien on the property of third persons.

The conclusion to which we have come is, we think, supported by the cases of *Wood Mow-*

ing & Reaping Mach. Co. vs. Vanstory, 171 Fed. 376, 96 C. C. A. 331; *Southern Hardware & Supply Co. vs. Clark,* 201 Fed. 1, 119 C. C. A. 339; *L. S. Smith & Bros. Typewriter Co. vs. Alleman,* 199 Fed. 1, 117 C. C. A. 577; *In re Columbus Buggy Co.,* 143 Fed. 859, 74 C. C. A. 611; *In re Reynolds* (D. C.), 203 Fed. 162."

B. Decisions of the State Supreme Court.

The District Court's decision is also in harmony with the decisions of the Supreme Court of the State of Washington.

> *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885;
> *Inland Finance Co. vs. Inland Motor Car Co.,* 125 Wash. 301, 216 Pac. 14.
> *Jordan vs. Peek,* 103 Wash. 94, 173 Pac. 726;
> *Ransom vs. Wickstrom & Co.,* 84 Wash. 419, 146 Pac. 1041.

In *Inland Finance Co. vs. Inland Motor Car Co., supra,* it was said:

> "It is our opinion that the trial court was in error in holding the agreement between the appellant and the motor car company to be a contract of conditional sale. A conditional sale, as the very terms imply, is a sale in which the transfer of the title to the buyer, or his retention of the title, is made dependent upon some condition. Usually the condition imposed is the payment of the purchase price, but, whatever may be its nature, to constitute a conditional sale there must be a contract between the parties by which the one party agrees to sell and the other party agrees to buy. This is not only the general understanding of such a transaction, but it is the transaction the statute regulates. The wording of the statute is (see Rem. Comp. Stat. Sec. 3790) P. D. Sec. 9767):

'That all conditional sales of personal property, or leases thereof, containing a conditional right to purchase, where the property is placed in the possession of the vendee, shall be absolute * * * unless * * * a memorandum of such sale, stating its terms and conditions * * * shall be filed * * *.'

These words plainly imply an agreement to sell on the one part and to buy on the other, and just as plainly imply that without such an agreement there is no conditional sale.

Turning to the record, it is at once apparent that there was no contract on the part of the appellant to sell, nor any contract on the part of the respondent to buy, the automobile here in question. The contract between them was a contract of consignment, under which the motor car company had the right to sell the automobile for and on behalf of the appellant. But it carried no right in the consignee to mortgage, pledge, barter or exchange the property for its own purposes, nor to sell it for a prior debt of its own, and hence the consignee's attempt to mortgage it was invalid. *Eilers Music House vs. Fairbanks,* 80 Wash. 379, 141 Pac. 885."

4. Conduct of Parties Subsequent to Consignment Agreement Was Not Such as to Show Sale.

A. Mingling of Consignee's Goods With Dealer's Goods.

It has been contended by the trustee that the conduct of the parties subsequent to the execution of the consignment agreement was such as to indicate that they did not intend to enter into a *bona fide* consignment arrangement. The fact that the

consigned goods were mingled with the other goods of the bankrupt upon its floors has been pointed out as affecting the validity of the consignment agreement.

In re National Home & Hotel Supply Company, 226 Fed. 840, 847, the fact that the petitioner's goods were commingled with other goods in the bankrupt's store without identification as consigned goods was held not to affect the agreement.

In the instant case the testimony of Messrs. Rothschild and Wadenstein is undisputed to the effect that the consigned goods could be displayed to the best advantage by mingling them with goods owned by the bankrupt.

B. Failure by Consignee to Comply With Contract in All Respects.

The fact that the dealer did not promptly report sales of consigned merchandise to the petitioner as required by the contract is strongly stressed in the referee's opinion as an important factor in determining against the validity of the consignment agreement.

Concerning such an argument, it was said *In re Weisl,* 300 Fed. 635, 640:

> "*Taylor vs. Fram* (C. C. A. 2), 252 Fed. 467, 164 C. C. A. 389, was also quite a different case. The Circuit Court of Appeals did not hold that the agreement was fraudulent *per se,* but that the parties made no effort to live up to it, and that for that reason it was no more than

the cover for an effort in effect to sell the goods and keep a secret lien upon them in the seller's favor. The agreement at bar was lived up to in all respects, except that in 1923 Dudley had filed no accounts of its sales until bankruptcy. That was, indeed, slack, very slack, business; but, while this was probably due to Breaker's control of both parties, it was in no sense because the arrangements were not *bona fide*. It would have been absurd for Seacoast intentionally to accept as a buyer a firm which was showing itself doubtful as a factor. When such a one begins to exhibit symptoms of financial decrepitude, the principal would be the last of all to step into the position of creditor. There was nothing whatever to be inferred from the delays in submitting the accounts and in remitting for the sales made, except that Breaker was abusing his position as president of Seacoast by allowing Dudley to remain in default."

To the same effect are:

M'Elwain-Barton Shoe Co. vs. Bassett, 231 Fed. 889;

In re National Home & Hotel Supply Co., 226 Fed. 840.

C. Form of Statement to Consignee.

The trustee has contended that the fact that the invoices covering the consigned merchandise did not on their face state that the merchandise was consigned is another indication that the parties did not intend a valid consignment. It will be remembered that the invoices of both petitioners to the dealer were marked "terms special" and that both Messrs. Irwin and Rothschild testified that that was the term coined to denote the special consignment arrangement.

Concerning such a contention, it was said in *M'Elwain-Barton Shoe Company vs. Bassett, supra:*

> "The billing of the shoes by appellant on the ordinary blank forms, without reference to the contract, cannot be allowed to overcome the contract itself, and the other undisputed testimony that the shoes were shipped under the terms of the contract."

To the same effect is *In re Reeves,* 227 Fed. 711, (D. C. N. Y.).

D. Mingling of Proceeds of Sale.

The mingling of the proceeds of the sale of the consigned goods with general funds of the bankrupt does not affect the validity of the consignment agreement.

In re National Home & Hotel Supply Company, 226 Fed. 870, it was said:

> "While the proceeds of these sales were mixed with the bankrupt's funds, slips were kept of all goods sold for the purpose of making the accounting, and as a matter of bookkeeping the funds were not mixed."

The same may be said of the instant case.

To the same effect is *Healey vs. Boston Batavia Rubber Company,* 268 Fed. 75.

5. Effect of Dealer's Financial Condition on Validity of Contract.

Great stress was laid by the trustee in the hearing before the referee and in the proceedings subsequent thereto, upon what the trustee contended

was the insecure financial condition of the dealer at the time of the execution of the consignment agreements as indicative of an intention on the part of the petitioners to enter into an arrangement with the dealer whereby they would claim the merchandise should the dealer fail and claim a sale in the event of its success. The contract, of course, does not bear out any such intention on the part of the parties.

It will be remembered that both Messrs. Irwin and Rothschild testified that they relied upon the bankrupt's financial condition as disclosed by its report dated January 1st, 1928, showing assets substantially in excess of liabilities. Regardless, however, of the dealer's financial condition at that time, it has been held in a number of cases that knowledge on the part of the consignor that the consignee was financially unable to purchase merchandise on open account does not affect the validity of the consignment.

We cite in support of this proposition:

Bartling Tire Co. vs. Coxe, 288 Fed. 314 (5th C. C. A.);

Thomas vs. Field-Brundage Co., 215 Fed. 891 (8th C. C. A.);

In re National Home & Hotel Supply Co., 226 Fed. 840, (D. C. Mich.).

ARGUMENT UPON CROSS-APPEALS.

I.

THE BILLS OF SALE.

1. THE KETCHAM & ROTHSCHILD BILLS OF SALE.

A. THE DISTRICT COURT'S DECISION OVERLOOKS LETTER OF MARCH 23RD ATTACHED TO CONTRACT, WHICH DISCLOSES SALE WAS NOT EFFECTED UNTIL EXECUTION OF BILL OF SALE.

It will be remembered that on March 23rd, 1928, the date of Mr. Rothschild's negotiations in Seattle with the bankrupt, the latter owed his concern some $16,000.00, the indebtedness arising from furniture previously sold the bankrupt on open account. (Tr. p. 18.) It was agreed between Rothschild and Wadenstein that the furniture previously sold the latter by Ketcham & Rothschild and then on the bankrupt's floors should be transferred back to Ketcham & Rothschild by means of a bill of sale and, after that happening, held by the bankrupt under the consignment agreement. This plan was evidenced by the following recitation contained in paragraph 9 of the consignment agreement:

> "Said party of the second part now has in its possession certain goods, as per attached list, which have heretofore been sold and delivered to it by said party of the first part on credit and which have not been paid for, and it is hereby agreed that the title to said goods and the same *is hereby transferred* and conveyed back to said party of the first part and that from and after this date the same shall be treated as having been delivered to said party of the second part on consignment and under

> and subject to all of the terms and conditions of this contract. In consideration of the transfer and conveyance of the title to said goods back to said party of the first part, that company does hereby cancel the indebtedness of said party of the second part for said goods."

Before the consignment agreement was executed by the bankrupt, it was discovered that the provisions of paragraph 9 just quoted could not be carried out for the reason that the bankrupt was unable to furnish an "attached list" of the merchandise which was to be transferred back. Mr. Rothschild testified:

> "At the time the consignment agreement was signed by the dealer we did not know exactly what furniture was on their floor; we knew there was an approximate quantity in dollars and cents. No list of our furniture on their floor specifying as to items was given to me while I was here in March but the approximate figure was taken from their stock cards and rendered. Subsequently they gave us a bill of sale back for the furniture of ours which was on their floor." (Tr. pp. 20 and 21.)

This testimony was borne out by Mr. Wadenstein, who said:

> "At the time the consignment contract was entered into Mr. Rothschild did not have an exact list of the furniture to be conveyed back in accordance with paragraph 9 of the consignment agreement. We went over our stock record to arrive at the approximate amount. It would have been necessary for us to take an inventory *to furnish him at that time with an exact itemized list of the Ketcham & Rothschild furniture on our floor and we did not have*

time to do that while he was here. At the time Mr. Rothschild was here it was not known either to Mr. Rothschild or to us what was the specific goods which would be conveyed back to the Irwin Company in accordance with the agreement." (Tr. pp. 38 and 39.)

In order to harmonize the statement in paragraph 9 of the consignment agreement that a list of the goods to be transferred back was "attached" therto and that a transfer back thereof in *praesenti* was intended with the fact that an itemized list of the furniture could not be furnished at that time, the bankrupt, contemporaneously with the execution of the consignment agreement, signed the letter of March 23rd, 1928, reading as follows:

"Referring to the *attached* memorandum of agreement:

It is our understanding that we are to furnish, shortly after the first of the month, an inventory of all of your merchandise on hand; that we also are to furnish bill of sale *which will act* as a transfer back to your Company of this merchandise, and that any difference in the amount of the account will be taken care of in three (3) equal payments, thirty, sixty and ninety days.

This refers particultrly to paragraph number nine." (K&R's Exhibit 1.)

Remington's Compiled Statutes, Sec. 5827, provides:

"No bill of sale for the transfer of personal property shall be valid, as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor

> unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made."

The District Court in its decision held that inasmuch as paragraph 9 of the contract contemplated a present sale by employing the words "is hereby transferred and conveyed back to said party of the first part," the Ketcham & Rothschild bill of sale was not recorded "within ten days after such sale" within the meaning of Remington's Compiled Statutes, Sec. 5827, *supra*. The District Court said:

> "The sale or transfer was made on the 23rd of March and delivered to and executed by the petitioners March 30th and April 1st, respectively. The bill of sale made on August 6, 1928, to Irwin & Company is but evidence of the sale made on the 23rd day of March, and the bill of sale not having been filed for record, cannot in any event have validity as against creditors, and, by the same token, the bill of sale executed by the bankrupts on the 16th day of April, 1928, and filed for record April 24 following is evidence only of the transfer made in March, *supra,* and the filing on the 24th of April is ineffective. The fact that an inventory was furnished at a later date is immaterial, since the contract was complete as to the essentials, and the formalities after inventory are immaterial." (Tr. p. 234.)

It is conceded that if April 16th, the date of the execution of the Ketcham & Rothschild bill of sale, be taken as the true date of that sale, then the bill of sale having been recorded on April 24th was timely recorded. It will be noted that the District

Court in its reasoning entirely overlooks and fails to mention the letter of March 23rd, which the referee in his memorandum decision (Tr. p. 194), found was executed contemporaneously with the consignment agreement, which fact was also specifically found by the referee in his finding 43. (Tr. p. 98.) This finding is not disputed by any testimony in the record and is supported by the testimony of Mr. Rothschild (Tr. p. 20) and of Mr. Wadenstein (Tr. p. 39). It is also supported by the context of the letter itself, which refers to the consignment contract as "being attached."

The conclusion is, therefore, inescapable that the District Court erred in failing to find and hold that the parties to the consignment agreement and the attached memorandum of March 23rd intended not a present sale but a sale when the items of furniture to be transferred back had been ascertained and the bill of sale executed, which took place on April 16th, 1928. The recording of that bill of sale on April 24th was, therefore, within the ten day period and timely.

This conclusion, which we submit is inescapable, was assented to by the referee in his memorandum decision (Tr. p. 221), where he said:

> *"The letter of March 23d was a part of the contract. It provided for the subsequent execution of a bill of sale. Such a bill of sale was executed on April 16th, and delivered to Ketcham & Rothschild. It was filed in the office of the Auditor of King County, Washington, on*

April 24th, which was within the statutory ten day period. This bill of sale, however, is here invalid because of the vendor's insolvency.

The last sentence of this quotation brings us to the next step in our discussion.

B. The Bill of Sale Was Not a Preference Because the Dealer Was Not Insolvent and the Consideration Was [illegible] a Present One.

The referee, in holding that the bills of sale constituted unlawful preferences, applied the state court rule as announced in *Nixon vs. Hendy Machine Works,* 51 Wash. 419, 99 Pac. 11, that when a corporation is not able to pay its debts in due course of business it is insolvent as far as its creditors are concerned and cannot prefer one over the other. (Tr. p. 218.)

The District Court said in this regard (Tr. p. 232):

> "The state insolvency laws are not controlling, in view of sub. (15), section 1, Bankruptcy Act:
>
> 'A person shall be deemed insolvent under the provisions of this act, whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed or removed with intent to defraud, hinder, or delay his creditors, shall not at a fair valuation be sufficient in amount to pay his debts.'
>
> No actual fraud is shown within the state insolvency laws."

The following decisions support the District Court's holding that in bankruptcy proceedings the federal and not the state rule of insolvency is applicable:

> *U. S. vs. State of Oklahoma,* 261 U. S. 253, 67 L. Ed. 638;
> *McGill vs. Commercial Credit Co.,* 243 Fed. 637;
> *In re Chappell,* 113 Fed. 543;
> *In re Walker,* 235 Fed. 285.

Were the assets of the bankrupt sufficient at the time of the execution of the bill of sale on April 16th to pay its debts? The trustee can point out no testimony in the record warranting a negative answer to this question. Petitioner Irwin's Exhibit 18-A was a financial statement of the bankrupt dated January 1st, 1928, prepared by its bookkeeper and a correct reflection of its financial condition at that time. (Tr. p. 62.)

Mr. Wadenstein said:

> "That was prepared by our bookkeeper at my request from the books of our concern, turned back to me by the bookkeeper before it was sent to Robert W. Irwin and was examined by me when I enclosed it in that letter.
>
> * * * This represents the condition of our business at that time as far as I know." (Tr. pp. 62 and 63.)

That statement shows assets of $230,580.52, with liabilities of $129,839.42, leaving an equity in capital and surplus of $100,741.10. (Tr. p. 12.)

Mr. Wadenstein testified that the value of his corporation as of April 1st, 1928, was more than $100,000.00. (Tr. p. 63.)

Petitioner Ketcham & Rothschild's Exhibit for Identification 54, consisting of balance sheets made up by Racine & Company from the bankrupt's book-keeper's trial balances, show the net value of bankrupt to have been more than $100,000.00. (Tr. p. 63.)

Mr. Wadenstein testified:

> "On April, 1928, we thought we had a business having an equity of $100,000. The period of five months up to September 1 so revolutionized our ideas that we meditated an assignment. The figures had jumped to a point that we felt it was not safe to continue any longer without some revision of our plans without jeopardizing the interests of our creditors." (Tr. p. 47.)

The reason for the failure was over-expansion caused by the move into the new building. Mr. Wadenstein said:

> "There was no question at all that we were operating with too little capital, but it is my firm belief that if we had not moved into the new building we would not have failed." (Tr. p. 46.)

We take it that the burden was on the trustee to establish that the bankrupt was insolvent and that the bill of sale was a preference. The trustee has done nothing further than to show that the dealer was a little slow in paying its bills. There can be no question, however, that had the dealer's

business been liquidated on April 16th, 1928, each creditor would have received one hundred cents on the dollar.

But regardless of the solvency or insolvency of the dealer on the date of the execution of the bill of sale, it was executed for a valid present consideration and hence was not a preference.

> "The rule denying the right to prefer particular creditors does not prevent a corporation, although insolvent, from making transfers or mortgages of its property in good faith to secure present advances of money to be used in paying its debts, in extricating itself from its difficulties, or otherwise in continuing the business, and it has been said that questions arising upon attempt by an insolvent corporation to prefer one creditor over another have no relation to transactions of this character."
> 14-A *C. J.* 899.

See also:

Terhume vs. Weise, 132 Wash. 208, 231 Pac. 954;
Lloyd vs. Sichler, 94 Wash. 611, 162 Pac. 45;
Hoppe vs. First National Bank of Renton, 137 Wash. 41, 241 Pac. 662;
Smith vs. National Bank of Commerce of Seattle, 142 Wash. 428, 253 Pac. 644;
Brinker vs. Peoples Savings Bank, 144 Wash. 93, 256 Pac. 1025;
Fogg vs. Blair, 133 U. S. 534.

In the latter case it was said:

> "That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders.

> It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred or mortgaged to *bona fide* purchasers for a valuable consideration except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence."

What was the valid present consideration in this case? The consideration was partially expressed in paragraph 9 of the consignment agreement after the cancellation of "the indebtedness of said party of the second part for said goods," but it went further than that. The dealer had committed itself to move to new quarters at Fifth and Pike Streets. These new quarters and its contemplated mode of business required considerable expansion in the display of furniture it would carry on its floors. It was a firm dealing only in high grades of furniture and having that reputation with the public and unique in its class. The testimony shows that the two petitioners were also in a class by themselves as manufacturers of high grade furniture. Obviously it became necessary for the bankrupt, upon removal to its new location, to make arrangements to carry an amount of extensive and high grade furniture commensurate with its expanded quarters.

After consultation by the dealer with the petitioners, it was found that the petitioners did not desire to sell the dealer the $25,000.00 or $30,000.00 worth of furniture such a display would have entailed and which, as we have said, was a necessary

and component part of the bankrupt's carrying on the new business in the new location. The petitioners were, however, willing to place with the bankrupt on consignment $15,000.00 worth of goods in the case of Robert W. Irwin Company, and $4,000.00 worth in the case of Ketcham & Rothschild, Inc., provided the bankrupt would, as a consideration for the petitioners' assistance in the new venture, sell back to the petitioners the merchandise of the petitioners at that time on the bankrupt's floor, the petitioners consenting that the merchandise so transferred back would remain with the bankrupt on consignment.

If it be objected that the petitioners did not obligate themselves in any way to consign merchandise to the dealer in the future, the answer is that they actually did execute their promise in that regard. We have, therefore, not a case of creditors of an insolvent concern preferring themselves over the remainder of the creditors by taking back goods previously sold to secure the pre-existing indebtedness, but we do have an exactly contrary case, viz., the bankrupt giving to the petitioners a transfer of goods previously sold in consideration for the shipment of some $20,000.00 worth of merchandise on consignment, which was of material and necessary assistance in the new venture, and a cancellation by the petitioners of the indebtedness created by the sale of the merchandise which was transferred back.

There is no dispute but that there came into the hands of the trustee in bankruptcy furniture included in the Ketcham & Rothschild bill of sale in the amount of $5,731.75. (Tr. p. 95.) The District Court's order should have directed the trustee to pay the petitioners, Ketcham & Rothschild, the 70% of that sum to which it was entitled under the stipulation for the sale of the consigned furniture by the trustee set forth on pages 183 *et seq.* of the transcript.

2. The Irwin Bill of Sale.

A. The Property Was Not Left in the Possession of the Vendor Within the Meaning of Rem. Comp. Stat. Sec. 5827, Requiring the Recording of Bills of Sale.

It will be remembered that while the Irwin consignment agreement was executed by the bankrupt on March 23rd and by the Irwin Company on April 1st (Tr. p. 112), and while the parties were operating under that agreement subsequent to the date of the execution, although it was not returned by the petitioner to the bankrupt until a later date, the Irwin bill of sale was not executed until August 6th, 1928. This delay was occasioned, as testified to by Mr. Wadenstein, because the parties were unable to agree upon how much of the Irwin make of furniture was to be included in the bill of sale to that company. (Tr. p. 40.) The letters and the exhibits which we have referred to in the statement herein show that constantly and continuously between April 1st and August 6th correspondence was

passing between the dealer and the petitioner, having as its object the reaching of an agreement as to the amount of merchandise and the items which were to be included in the bill of sale.

The bill of sale was not recorded and it was the District Court's conclusion (Tr. p. 234) that this failure made the Irwin bill of sale vulnerable to the trustee's attack. This conclusion overlooks the fact that Remington's Compiled Statutes, Sec. 5827, *supra,* only requires the recording of the bill of sale "where the property is left in the possession of the vendor." In this instance the vendor was Renfro-Wadenstein, a corporation, in its capacity as owner of the merchandise of this petitioner previously shipped on open account. After April 1st, 1928, the parties were operating under the consignment agreement. The property included in the Irwin bill of sale was not left in the possession of the vendor within the meaning of the above statute, but was left with it as consignee or bailee for the petitioner. Where previously the dealer had held the property as its own merchandise, subsequent to that date it was held by the dealer as consignee for the petitioner. Everything was done which, under the circumstances, could have been done to have denoted a transfer of possession from the bankrupt corporation to Renfro-Wadenstein as consignee for petitioner. Notes were executed by the bankrupt to petitioner as evidence of the indebtedness for the difference between the total debt and the merchan-

dise transferred back. The merchandise so transferred back, where it had been previously shown on bankrupt's books as its own merchandise, was transferred to a separate consignment folder. The bankrupt's books showed a cancellation of the indebtedness incurred in the purchase of this furniture. To have actually re-transferred this property to the petitioner would have necessitated the useless gesture of sending it back to Grand Rapids and then returning it to the bankrupt.

That the possession of the property is not necessarily left with the vendor within the meaning of this section because there is no manual delivery of the property sold, was announced in the following cases:

> *Haskins vs. Fidelity Nat. Bank,* 93 Wash. 63;
> *Spiecker vs. First Nat. Bank of Odessa,* 134 Wash. 280.

In the *Haskins case, supra,* it was said:

> "Although such possession as a purchaser can reasonably take must be taken, it is not essential, as against creditors and subsequent purchasers, that there should be in all cases an actual manual delivery or a change of possession at the time of the sale, or immediately."

The District Court's decision as to the Irwin bill of sale is based solely upon the ground that it was not recorded within the statutory period. (Tr. p. 234.) We respectfully submit that for the reasons above stated it was unnecessary to record this bill of sale.

Furthermore, the same considerations exist for holding the Irwin bill of sale was not an attempt to prefer it over the remainder of the creditors of the dealer as exist in the facts surrounding the execution of the Ketcham & Rothschild bill of sale. As we have attempted to show, the dealer's assets were at the time of the execution of the consignment agreement more than sufficient to liquidate its then existing debts and an ample present consideration flowed from the petitioner to the dealer for the execution of the bill of sale back.

In conclusion on this point, the referee found, and it is uncontradicted, that there came into the hands of the trustee furniture described in the Irwin bill of sale to the amount of $8,391.00. (Tr. p. 93.) We submit that petitioner should not have been relegated to relief as a general claimant on this item.

II.

Accounts Receivable and Proceeds of Sale of Consigned Furniture.

1. These Items Have Been Definitely Traced to the Trustee.

The referee found, and it is undisputed, that there came into the hands of the *trustee in bankruptcy:*

(a) Contracts and accounts receivable representing Irwin merchandise (including goods described both in the bill of sale and shipped

subsequent to the consignment agreement), which contracts and accounts receivable were not collected prior to the bankruptcy proceeding, amounting to $1,725.00. (Tr. pp. 93 and 94.)

(b) Contracts and accounts receivable representing Ketcham & Rothschild merchandise (including merchandise described in bill of sale and shipped subsequent to consignment agreement), which contracts and accounts receivable were not collected prior to the bankruptcy proceeding, amounting to $2,021.00.

It is further conceded that an examination of the exhibits in this case (petitioners' Exhibits 50 to 52 inclusive) disclose what proportion of these two items were composed of receivables representing furniture covered by the bill of sale and what proportion of furniture shipped subsequent to the consignment agreement. Obviously the District Court, to have been consistent in its holding that the consignment agreements were valid as to the merchandise shipped subsequent thereto, should have also awarded petitioners so much of these *uncollected* contracts and accounts receivable coming into the hands of the trustee as arose from the sale of furniture shipped subsequent to the consignment agreements. The District Court, however, dismissed the matter with the statement (Tr. p. 238):

> "No trust relation has been traced to accounts which came into the possession of the trustee in bankruptcy, or merchandise sold under consignment. These funds were so commingled with the general funds of the bankrupt that no identity is established."

This holding, of course, is contrary to the undisputed findings of the referee above noted.

It further overlooks the fact that the entire assets of the bankrupt were sold at trustee's sale under order of court and stipulation between the trustee and petitioners (Tr. p. 186 *et seq.*), the order showing that the very property sought to be reclaimed came into the hands of the trustee, reciting the property to be sold to be in part:

> "All notes, bills, accounts and contracts receivable, including those made by S. T. Hills as trustee and including any collections made by S. T. Hills as trustee on accounts assigned to General Discount & Mortgage Corporation and/or Seattle Discount Corporation, * * *." (Tr. p 189.)

The record also shows that S. T. Hills as assignee for Renfro-Wadenstein:

(a) Received payment on Irwin furniture (including furniture described in the bill of sale and shipped subsequent to the consignment agreement) sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $425.67.

(b) Sold Irwin furniture (including furniture described in the bill of sale and furniture shipped

subsequent to the consignment agreement) for which there was collected by him and the receiver and the trustee in bankruptcy $2,062.00. (Tr. p. 94.)

The record discloses that as represents the Ketcham & Rothschild furniture, Hills as assignee:

(a) Received payments on furniture (including furniture described in the bill of sale and shipped subsequent to the consignment agreement) sold by bankrupt prior to the assignment for the benefit of creditors in the sum of $568.75;

(b) Sold Ketcham & Rothschild furniture which was included in the bill of sale to Ketcham & Rothschild, for which there was collected by him and the receiver and the trustee $1,593.50. (Tr. p. 96.)

Hills as assignee turned over to McLean, who succeeded him as receiver in bankruptcy, $2,935.88 (Tr. p. 96), and McLean turned over to the trustee a fund in excess of $5,321.22. (Tr. p. 75.)

It will be seen, therefore, that the uncollected and unpaid accounts receivable and contracts were definitely and directly traced to the trustee. There can be no question about their identity. The collections made on the other accounts receivable and contracts were sufficiently traced into the hands of the trustee by the showing above made that the collections were made by the assignee and by the receiver and that a sufficient sum was turned over

to the trustee by the assignee and the receiver to cover those collections.

In the following cases it was held that the consignors were entitled to recover from the trustee in bankruptcy accounts receivable representing consigned merchandise and the proceeds thereof under circumstances similar to those existing here.

> *International Agriculture Corp. vs. Sparks,* 250 Fed. 318 (D. C. S. C.);
> *Bartling Tire Co. vs. Coxe.* 288 Fed. 314;
> *In re McGehee,* 166 Fed. 928;
> *In re Taft,* 133 Fed. 511;
> *In re Bank of Madison,* Fed. Cas. No. 890;
> *In re Kurtz,* 125 Fed. 992.

2. The Assignments of These Accounts to the Discount Houses Were Invalid.

The fact that some of the accounts receivable, with which we are here concerned, were assigned by the bankrupt to discount houses cannot affect petitioners' right to reclaim them. Paragraph 10 of the contract specifically provided that:

> "The accounts representing the same (consigned merchandise) and the proceeds thereof shall continue to belong to and be the property of the party of the first part. * * *"

The testimony of Messrs. Irwin and Rothschild discloses that they at no time had knowledge of or consented to the bankrupt's practice of discounting these accounts. In *Eiler's Music House vs. Fairbanks,* 80 Wash. 379, it was said:

> "It is the settled law that a factor can neither pledge the goods of his principal, nor

dispose of them by way of exchange or barter, nor sell them for a prior debt.

'Whenever the factor has bartered or disposed of goods in a manner not within the ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case it is wholly immaterial whether the person dealing with the factor knew him to be such or not. (Citing cases.)

In the absence of statutes which furnish protection to persons dealing with factors, the principal can recover his property wherever he can trace it as distinct from that of the factor into whomsoever's hands it may have come. He is entitled to recover the specific goods themselves if they can be had, and if the goods themselves cannot be recovered he may recover their proceeds if they can be traced. Thus if a factor barters his principal's goods in a manner not authorized by the principal and not within the ordinary modes of transacting business, the principal may follow and reclaim the property whether the person dealing with the factor knew him to be such or not. But if the principal has by any act of his own induced a third person to believe he has given the factor authority to dispose of the goods, the principal cannot reclaim them. The principal may recover goods or the proceeds of a consignment of a person to whom they were turned over in the payment of an antecedent debt due from the factor. If goods are wrongfully taken from the possession of a factor by an officer the owner may recover them back.' "

The testimony discloses that none of the finance houses ever made any collections on the customers' accounts assigned them, the collections were made

by the bankrupt; the finance houses did not bill the customers for the accounts receivable and did not at any time notify the customers of the assignment of the accounts to them, nor were the customers advised by the dealer that their accounts had been assigned. (Tr. p. 58.) One of the managers of the finance houses involved on the stand admitted as much. (Tr. p. 81.) The assignments to these finance houses under the circumstances were, under the following authorities, invalid:

Benedict vs. Ratner, 268 U. S. 353, 69 L. E. 991;
Fainardi vs. Dunn, 128 Atl. 207 (R. I.);
Jackson vs. Sedgwick, 189 Fed. 508.

It is therefore respectfully submitted:

1. As to the appeal of the trustee, the District Court's decision should be affirmed.

2. As to the cross-appeals of the petitioners, the District Court's decision should be reversed.

Respectfully submitted,

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